

On January 7, 2015, the Court referred the question of whether the instant action should be dismissed without prejudice pursuant to the Order to Chief Magistrate Judge Gold for a report and recommendation. Dkt. 7 (“Referral”). On January 8, 2015, Chief Magistrate Judge Gold issued a report and recommendation to the Court that the action be dismissed without prejudice (“Report and Recommendation”), and ordered that any objections to this report and recommendation be filed by January 26, 2015. Dkt. 8 (“R&R”). A copy of the Report and Recommendation was mailed to Plaintiff that same day. Dkt. 9 (“Mailing Receipt.”).

DISCUSSION

In reviewing a report and recommendation, the court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). When no objections have been filed, a district court reviews a report and recommendation for clear error. *See Zeitone v. Korsinsky & Klein, LLP*, 13-CV-383, 2013 WL 5937397, at *1 (E.D.N.Y. Nov. 4, 2013) (Kuntz, J.) (citing *Reyes v. Mantello*, 00-CV-8936, 2003 WL 76997, at *1 (S.D.N.Y. Jan. 9, 2003) (Cote, J.)); *Covey v. Simonton*, 481 F. Supp. 2d 224, 226 (E.D.N.Y. 2007) (Garaufis, J.).

Federal Rule of Civil Procedure 4(m) states, “[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m). “[N]otice to the plaintiff must be given prior to a *sua sponte* dismissal.” *Thompson v. Maldonado*, 309 F.3d 107, 110 (2d Cir. 2002) (citation omitted; emphasis in original). “[A] district court abuses its discretion when, among other things, it dismisses a complaint *sua sponte* without first giving notice to the plaintiff and providing an opportunity for [him] to show good cause for the failure to effect timely service.” *Meilleur v. Strong*, 682 F.3d 56, 61 (2d Cir. 2012) (citation omitted; emphasis in original). Before dismissing a case for failure to timely serve, a district court must look at the “totality of the facts,” including whether “process had been properly served, or whether [] such service was likely imminent.” *Id.* at 63.

No objections to the Report and Recommendation have been filed. Accordingly, the Court reviews the Report and Recommendation for clear error. Plaintiff was put on notice by the

Order of March 11, 2014 that if Plaintiff failed to serve Defendants by July 3, 2014—120 days after the filing of the Complaint—and did not show good cause, Chief Magistrate Judge Gold would recommend dismissal without prejudice. *See* Order. Nearly ten months later, on January 8, 2015, Plaintiff had still failed to effect service or show good cause for failure, and Chief Magistrate Judge Gold recommended dismissal. *See* R&R. Plaintiff was again put on notice of the Report and Recommendation and of the January 26, 2015 deadline to object to the Report and Recommendation. *See* Mailing Receipt. At this juncture, another ten months have passed since the Report and Recommendation, and Plaintiff has still failed to serve Defendants, show good cause for failure to serve, or object to the Report and Recommendation. Accordingly, the Court finds there was no clear error in Chief Magistrate Judge Gold's determination that the action should be dismissed without prejudice. The Court hereby adopts the Report and Recommendation in its entirety.

CONCLUSION

For the reasons stated above, the Report and Recommendation issued by Chief Magistrate Judge Gold on January 8, 2015, is hereby ADOPTED in its entirety. This action is dismissed without prejudice. The Clerk of Court is respectfully instructed to close this case.

SO ORDERED.

/S/ Judge William F. Kuntz, II


HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: November 6, 2015
Brooklyn, New York